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No. 85-316 (2)

IN THE

# Supreme Court of the United States

**October Term, 1985**

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STEVEN OWEN,

*Petitioner,*

*v.*

JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY,

*and*

HON. JOHN B. POERSCH, as District Attorney of Schenectady County,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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## PETITIONER'S REPLY BRIEF

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**PETITIONER'S REPLY BRIEF.**

Respondent's argument that there is no conflict between the highest court of the State of New York and the highest courts of other states is logically fallacious. The argument

assumes that there is no possibility that a verdict of acquittal had been reached on any of the counts submitted to the jury. There is no basis for that assumption.

Respondent assumes, repeatedly, that the only issue upon which the jury could have been divided is the question of whether petitioner or another was driving the car at the time of the accident. However there are other issues which could have divided the jury.

For example, the jury might have decided that petitioner was the driver but have been undecided (1) whether he should be subjected to criminal liability at all, and (2) if so, for what level of intent. Thus the jury could have acquitted petitioner of the greatest charge, manslaughter in the second degree (New York Penal Law § 125.15), and have been deadlocked on the question of whether he should be found guilty of criminally negligent homicide (Penal Law § 125.10).

Respondent concedes "[u]nquestionably, when there is the possibility that a jury has acquitted on one or more of several counts, the prudent trial practice is to conduct a poll to determine which counts are susceptible of mistrial for want of jury agreement" (Br., p. 8). Respondent's distortion of the issues before the jury does not prove that such a possibility was not present in this case. There is nothing in the record which shows that there was no possibility that the jury had reached a partial verdict of acquittal.

It is constitutionally offensive to retry petitioner for any count for which he has already been acquitted by the first jury. There is nothing in the colloquy between the trial judge and members of the jury which shows how the jury was deadlocked.

Contrary to respondent's assertion, this case does not merely involve a question of interpretation of a New York statute which has no federal constitutional implications and is of no interest in other jurisdictions. This Court regularly examines state statutes to determine if they pass constitutional muster. The opinion of this Court in this case would give guidance to other states facing similar questions.

As the jury was not made aware that it could announce a partial verdict, it is irrelevant that no juror spoke out to state that a verdict had been reached on one or more of the counts. The jury had not reached a verdict on all the counts and evidently was not told that it had any alternative except to attempt to reach a unanimous verdict on each of the four counts.

Respondent cites several cases which purportedly stand for the proposition that general questioning of the jury is an acceptable alternative (Br., p. 11). Evidently respondent misperceives the issue. The cited cases state that it is not necessarily error for the court to discharge the jury without polling each juror as to whether he or she agrees that there is no reasonable possibility of agreement. The cases do not discuss the issue presented here: whether the jury should have been asked if there had been agreement that the defendant should have been acquitted of one or more of the counts submitted, even though the jury was not able to reach agreement on all counts (see *United States v. See,* 505 F.2d 845, 851 [9th Cir. 1974]; *Clemsen v. Municipal Court,* 18 Cal.App.3d 492, 96 Cal.Rptr. 126 [1971]; *People v. Caradine,* 235 Cal.App.2d 45, 44 Cal.Rptr. 875 [1965]). None of those cases contradict the cases cited on page 7 of the Petition.

Respondent declares that the issue which petitioner raises has been presented, and rejected in the federal courts (citing *United States v. Larry,* 536 F.2d 1149 [6th Cir. 1976]). Respondent errs. *Larry* involves the same issue discussed in the last paragraph, not the question raised by the present petitioner.

A direction from this Court that, in a multicount case, a jury must be polled before declaration of mistrial, would not impair the discretion of the trial judge. To engage in such questioning would be no more onerous a task than questioning a defendant as to whether a guilty plea is truly voluntary. The questioning would not risk coerced verdicts. After questioning the jury could be discharged with the defendant knowing whether or not he had been acquitted of any counts so that he could not be retried for those counts.

Respectfully submitted,

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